

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

1. On June 27, 2007, a Complaint was filed with the Commission against Respondent Ray's Food Basket for sexual harassment and constructive discharge.
2. On April 16, 2008, an order was entered defaulting Respondent Ray's Food Basket.
3. On June 27, 2007, a Complaint was filed with the Commission against Respondent Ray Ishmeal alleging sexual harassment.
4. On May 28, 2008, an order was entered defaulting Respondent Ray Ishmeal.
5. On June 27, 2008, an order was entered that consolidated ALS 07-478 and ALS 07-480 under ALS 07-478C.
6. On July 3, 2008, the Commission set a public hearing on damages for September 25, 2008.
7. A copy of the July 3, 2008 Order was served on both Respondents on July 7, 2008 and a proof of service was filed with the Commission.
8. On September 25, 2008, the date of the public hearing, Complainant appeared with her counsel. Respondents failed to appear.
9. On September 25, 2008, the public hearing proceeded with Complainant taking the stand.
10. On September 25, 2008, having found good cause, an order was entered that continued the public hearing to October 6, 2008.
11. The September 25, 2008 Order was served on Respondents and a proof of service was filed with the Commission.
12. On October 6, 2008, Complainant appeared with her counsel. Respondents failed to appear. Complainant continued with her presentation of her case on damages.
13. Complainant lives with her parents and her four year old baby, as well as her brother, James Bennett.
14. Complainant is single.

15. On June 27, 2006, Complainant went to the grocery store, Ray's Food Basket, on 87th and King Drive to look for a job.
16. Upon arrival, Complainant spoke to the cashier who informed Respondent Ray Ishmeal (Ray) that she was downstairs.
17. The cashier gestured to the Complainant to go up to an area where there were some see-through mirrors allowing those on top to look down.
18. Ray eventually came down to greet Complainant and took her upstairs.
19. Complainant and Ray went through two doors and a hallway to the office upstairs.
20. As they walked upstairs, Ray told Complainant she had the job and held her hand.
21. Ray asked Complainant if she was scared and she said no.
22. Ray then walked into the middle of the office and rubbed Complainant's hand.
23. Ray took Complainant's hand and told her to rub his stomach.
24. Ray leaned against the desk and unbuttoned his pants.
25. Ray continued to tell Complainant to rub his stomach, which she did.
26. Ray unbuttoned Complainant's pants.
27. Ray stuck his fingers inside of Complainant and took his other hand and masturbated.
28. Ray asked Complainant if she was all right.
29. Complainant said she was okay and cool, but she felt that Ray would not hire her for the job if she told him that she was not all right or if she told him to stop.
30. Ray took a napkin and wiped himself and then walked to the bathroom and flushed the napkin down the toilet.
31. While still upstairs, Ray told Complainant to sit down, go through the newspapers, and practice on the cash register.

32. Complainant sat down and practiced on the cash register until Ray told her to go home.
33. When Complainant got downstairs, she told the cashier that she was planning to quit.
34. The cashier told Complainant not to quit because Complainant needed the job for her baby.
35. Complainant agreed she needed the job.
36. The cashier suggested that Complainant stay away from Ray.
37. A few days later, Complainant believed something similar happened between Ray and another young woman.
38. Complainant felt scared and nervous when she was alone with Ray.
39. Complainant let Ray touch her because she needed a job.
40. Complainant left Ray's Food Basket on June 27th, 2006 and went home.
41. Complainant told her best friend what had happened.
42. A couple of days later, Complainant told her parents because she was stressed out.
43. After the incident, Complainant did not want to hold her baby, then two, or look at her.
44. After the incident, Complainant thought about what had happened and it hurt to look at her baby.
45. After the incident, Complainant had trouble looking at her baby for about a month.
46. After the incident, Complainant took a shower.
47. Complainant cried in the shower for about thirty minutes.
48. For approximately five days, Complainant did not want to talk to other people and did not take any telephone calls.

49. Complainant cried all of the time, especially when she washed herself.
50. Finally, Complainant felt she needed to talk so she told her parents what had happened.
51. After the incident, Complainant had no appetite, and had trouble sleeping.
52. After the incident, Complainant washed her hands three of four times per day for two weeks because she felt Ray's fingers in her.
53. When Complainant first left Ray's Food Basket after the incident, she tried to contact an advocate she had previously talked with on abuse issues.
54. Complainant was unable to reach the advocate.
55. After this experience at Ray's, Complainant was reluctant to work again and was picky as to who she would be around or where she would work.
56. Complainant worked at Ray's Food Basket for approximately two and a half weeks.
57. Respondent never paid Complainant, although she believes she was supposed to get paid.
58. Complainant believes she was supposed to be paid \$6.50 per hour.
59. Complainant was not supposed to be paid for training.
60. Complainant was in training for the first week.
61. Complainant believes she was supposed to work 38 to 40 hours per week as a full-time cashier.
62. Complainant's last day of work at Ray's Food Basket was July 3, 2006.
63. Complainant believes she worked 36 hours for the second week of work.
64. Complainant is eating now, doing okay and interacts with the family and others.
65. After leaving Ray's Food Basket, Complainant worked for three months at BP gas station in August or September, 2006 as a cashier and got paid \$7.50 per hour for 28 hours per week.

66. Complainant left BP gas station because of transportation issues.
67. Next, Complainant worked at Kenny Construction in or around February, 2007 as a laborer for \$5.00 per hour, working 47 or 48 hours per week.
68. Complainant worked for Kenny Construction for only five weeks because the weather got bad and she got laid off.
69. Next, in around September 2007, Complainant began working at PLS Check Cashier's Currency Exchange as a window clerk cashier for \$8.50 per hour, working 40 hours per week.
70. Since April 2008, Complainant has been on leave with PLS Check Cashier's Currency Exchange due to an accident.
71. Michael Bennett, Jr. is Complainant's nephew.
72. Michael has lived with Complainant for about ten years.
73. When Complainant told Michael about Ray touching her, she was crying and sad.
74. After the incident, Michael and his brothers had to help Complainant take care of her daughter because Complainant was not up to it.
75. After the incident, Michael observed that Complainant did not want to leave the house or her room.
76. After the incident, Michael observed that Complainant was not eating and stayed in the bathroom a lot.
77. On October 6, 2008, an Order was entered that set a schedule for a fee petition and responses thereto.
78. The fee petition Order was mailed to Respondents.
79. The Order addressed to Ray's Food Basket was returned to the Commission stating, "not deliverable, unable to forward."

80. Complainant filed a fee petition on November 26, 2008, requesting attorney's fees totaling \$6,025.35, based on an hourly rate of \$180.00 for Attorney Scott Fanning for a total of 21.33 hours, and an hourly rate of \$95.00 per hour for law clerks and paralegals for a total of 23.01 hours.

81. Complainant also requested total expenses of \$310.78 for copies, faxes and postage.

82. Complainant filed a proof of service with the Commission certifying that her fee petition was served on both Respondents on November 26, 2008.

83. Respondents failed to file appearances and responses to the fee petition.

84. Attorney Fanning has been licensed as an attorney in the State of Illinois since October, 2007.

85. Attorney Fanning primarily represents plaintiffs in employment and labor law issues.

86. Attorney Fanning charges \$180.00 per hour.

87. Attorney Fanning submitted his Affidavit in support of Complainant's fee petition.

88. In his Affidavit, Attorney Fanning states that the rate of \$180.00 per hour is at or below the average charged by attorneys in the community of similar experience handling comparable cases.

89. Attorney Fanning also states in his Affidavit that his law clerks and paralegals bill their time at \$95.00 per hours and that is the same hourly rate clients regularly pay for such time.

Conclusions of Law

1. Complainant is an "aggrieved party," Respondent Ray's Food Basket is an "employer," and Respondent Ray Ishmeal is an "employer" or agent of an "employer," as those terms are defined in the Illinois Human Rights Act, 775 ILCS 5/1-103(B), and 5/2-101(B)(1)(a) and (b) .

2. The Commission has jurisdiction over the parties and the subject matter of this action.
3. In accordance with my April 16, 2008 Default Order, Respondent Ray's Food Basket is liable for violation of the Illinois Human Rights Act that prohibits sexual harassment and constructive discharge.
4. In accordance with my May 28, 2008 Default Order, Respondent Ray Ishmeal is liable for violation of the Illinois Human Rights Act that prohibits sexual harassment.
5. Complainant has not demonstrated that she is entitled to back pay.
6. Complainant has demonstrated that she is entitled to emotional distress damages in the amount of \$35,000.00
7. In light of the finding of liability against Respondents, Respondents should be ordered to cease and desist from any sexually harassment in the future.
8. In light of the finding of liability against Respondents, Respondent Ray Ishmeal should be ordered to contact the Department and participate in employer/employee training on the Illinois Human Rights Act and other civil rights laws.
9. Because of their failure to file appearances and respond to Complainant's fee petition, Respondents have waived the issue of fees.
10. Attorney Scott Fanning's hourly rate of \$180.00 is reasonable.
11. Attorney Scott Fanning's law clerk's hourly rate of \$95.00 is reasonable.
12. The total amount sought for attorney's fees is excessive and should be reduced.
13. Complainant is entitled to attorney's fees in the amount of \$4,519.00.
14. Complainant is entitled to costs in the amount of \$310.78.

Discussion

A. Default

Although granted an opportunity to respond to Complainant's Motions for Default, both Respondents failed to respond. Thus, on April 16, 2008, I granted Complainant's Motion for Default against Respondent Ray's Food Basket, and on May 28, 2008, I granted Complainant's Motion for Default against Respondent Ray Ishmael. I recommend that the default against Respondent Ray's Food Basket be affirmed by the Commission and a finding of liability for sexual harassment and constructive discharge be found against it. I also recommend that the default against Respondent Ray Ishmael be affirmed by the Commission and a finding of liability for sexual harassment be found against him. Once an order of default is entered, the allegations of the complaints are deemed to be admitted. **Payne and Roseland Christian Health Ministries, Inc., IHRC, 11591, Jan. 1, 2003.** As a result, a finding of liability against Respondents is appropriate in this case.

B.Damages

In accordance with the Default Orders, this matter proceeded to a public hearing on damages.

Back Pay

The first element of damages to be considered is back pay. Complainant's testimony was confusing as to what days she was training and what days she worked and was entitled to be paid. Her testimony indicated that she first started working for Ray's Food Basket on June 27, 2006. (Tr. at 14.) She said she worked for Respondent Ray's Food Basket for maybe two and a half weeks. (Tr. at 24.) Complainant said her last day of work was July 3, 2006. (Tr. at 25.) Thus, on its face, Complainant's

It is apparent from the record that Complainant suffered a severe emotional reaction to Respondent Ray Ishmeal's sexual harassment. The degree of emotional distress was significantly over and above that which would be expected from "the mere fact of a civil rights violation" and, therefore, compensable under the Illinois Human Rights Act. **Harris and Vinylgrain Industries of Illinois, IHRC, 11382, Aug. 1, 2001.**

The probative factors in determining the amount of an emotional distress award are the nature and duration of the suffering experienced by the complainant. **Smith v. Cook County Sheriff's Office, 19 III HRC Rep 131 (1985).**

In support of her claim for emotional distress damages, Complainant testified on her own behalf. She also had her nephew testify as to her behavior after the sexual harassment occurred. During some of her testimony, as well as her nephew's testimony, Complainant cried.

This case involves physical acts of sexual harassment. The physical acts relating to Complainant, although severe, occurred once and were not repeated.¹ The physical acts included Respondent Ray Ishmeal taking Complainant's hand and telling her to rub his stomach, unbuttoning Complainant's pants, fingering the Complainant and masturbating.

Respondent Ray Ishmeal took advantage of his position as her new employer by merging the interview process, the offer of a job and his sexual harassment. This was done in an upstairs area, removed from other employees and customers.

Complainant stated she felt scared and nervous when she was alone with Ray, but failed to tell him to stop because she needed the job. Complainant told her best friend what had happened, but then felt she could not talk to others for awhile. She did

¹ There was testimony that Respondent Ray Ishmeal may have sexually harassed other cashiers, but it was characterized as a belief with no personal knowledge provided. As such, this alleged fact was not considered.

testimony is inconsistent. In addition, at one point she said she did not get paid, but she was supposed to be paid. (Tr. at 24.) But she also testified that she did not have a work schedule or know her expected work days after the training period. (Tr. at 24.) Complainant admitted that she had been told the Respondent was not paying for her training time. (Tr. at 24 and 26.) She also testified that she was being trained for some or all of the days that she worked. (Tr. at 24 and 26.) At some point, Complainant stated that she calculated her own hours and came up with 36 hours for the second week of work. (Tr. at 26.)

It is true that calculations of back pay can be somewhat speculative and ambiguities in this process must be resolved in favor of a prevailing complainant, and against the discriminating employer, since the employer's wrongful acts gave rise to the uncertainty. **Clark v. Human Rights Comm'n, 141 Ill App3d 178 (1986)**. However, some clarity in the record is required. From the testimony, I cannot determine an appropriate back pay award. Complainant's testimony is conflicting. She appeared confused and not particularly credible on this point. Complainant was given the opportunity to submit a post-hearing brief, which might have provided some clarity, but declined to do so. Given the foregoing, I cannot determine a back pay award from the record.

Emotional Distress

Emotional distress damages are recoverable as actual damages for injury or loss suffered by a complainant and caused by violations of the Illinois Human Rights Act. **Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill App 3d 339 (1989)**. Complainant has the burden of coming forward and presenting evidence for the relief she seeks. Complainant must prove by a preponderance of the evidence that she is entitled to emotional distress damages.

reach out to a counselor with whom she had a prior relationship in an abuse issue, but could not locate her. Complainant eventually told her parents. She had trouble looking at, and taking care of, her baby for at least a month. Her nephew and other family members helped her care for her daughter. Upon getting home after the incident, Complainant immediately took a shower and cried for thirty minutes. For several days, she would not talk to her family or accept any telephone calls. Complainant was not hungry and had trouble sleeping. She kept washing her hands, sometimes three and four times per day for approximately two weeks. She said she regularly washed her hands because she kept thinking about Ray's hands in her body. Complainant also testified that she had concerns about future employers doing similar acts to her and was reluctant to work again, although she did gain employment.

Complainant's testimony on her emotional damages appeared genuine, although I admonished Complainant's counsel to stop leading the witness. Although she was emotional damaged, her testimony, and that of her nephew, indicated that Complainant has been able to piece her life together and is "back" to her old self. She has had a series of jobs since working for Respondent.

In sum, based on the record in this case and Commission precedent, I find Complainant has met her burden of proof; an award of **\$35,000.00** for emotional distress damages is appropriate.

Cease and Desist

Since Default Orders have been entered and there has been a finding of liability against the Respondents, it is recommended that Respondents be ordered to cease and desist from sexual harassment and constructive discharge in the future. See **Magraff and Alexopolis, IHRC, 7082, Nov. 8, 1993.**

Sensitivity Training

Although the Illinois Human Rights Act does not specifically provide that an order for relief may include sensitivity training, Respondent Ray Ishmeal would be greatly served if he contacted the Department and went through employer/employee training on the Illinois Human Rights Act and other civil rights laws.

Attorney's Fees

As permitted by my Order entered on October 6, 2008, Complainant's attorney submitted a fee petition. In considering petitions for the award of attorney's fees and costs, the Commission requires that any award be fair and reasonable. The most common measure of fees remains the charging of a set rate per hour for work performed in consideration of the client's matter at hand, and multiplying that figure by the number of hours expended.

The standard for determining the proper fee award by the Commission is found in **Clark and Champaign National Bank, 4 Ill HRC Rep 193 (1982)**. Respondents chose not to file a timely response. Since no responses were filed, all issues related to the petition are waived. **Leseiko and Chase/Ehrenberg & Rosene, Inc., IHRC, 11592, Mar. 23, 2004**. However, I have still analyzed the billing rates and hours requested to determine if they meet appropriate standards of reasonableness.

a. Reasonable Hourly Rates

In the fee petition, Attorney Scott Fanning requests \$180.00 per hour for his time on this case. In support of his fee petition, Complainant's attorney submitted his own Affidavit. In his Affidavit, Attorney Fanning states that the rate of \$180.00 per hour is at or below the average charged by attorneys in the community of similar experience handling comparable cases.

Attorney Fanning has been licensed as an attorney in the State of Illinois since 2007. He has other cases before the Illinois Human Rights Commission. He bills other clients, who have matters at the Commission, at the same rate requested here. Attorney Fanning also requests that his paralegal and law clerks be billed at the rate of \$95.00 per hour.

Thus, even without Respondents' waiver of fee petition objections, I find Attorney Fanning's, as well as his paralegal's, rates reasonable, and in accordance with Commission's recent orders on attorney's fees.

b. Number of Hours Reasonably Worked

Once the hourly rate is decided, the next step is to determine whether the hours claimed are reasonable. The total fee requested is \$6,025.35, based on 21.33 hours for Attorney Fanning and 23.01 hours for his law clerks/paralegals. Although uncontested by Respondents, I still must carefully examine fee statements. Complainant failed to file detailed fee statements itemizing the hours billed for services performed by Attorney Fanning or his paralegals/law clerks. Thus, the fee petition is not in accordance with 56 Ill. Admin. Code §5300.765 (a) (1) and is insufficient to allow appropriate scrutiny. For the reasons set forth below, I recommend that the requested attorney's fee be reduced. I recommend that fees be reduced by 25% of Attorney Fanning's proposed fees for a total amount of \$4,519.00. That amount is consistent with Commission precedent for attorney's fees in similar cases with similar work. I also recommend that the costs requested be awarded because they are appropriate and reasonable. Thus, the total fees and costs awarded should be \$4,829.78.

Recommendation

It is recommended that the Commission:

- (1) order Respondents, jointly and severally, to pay Complainant emotional distress damages of \$35,000.00;
- (2) order Respondents, jointly and severally, to pay Complainant attorney's fees and costs in the amount of \$4,829.78;
- (3) order both Respondents to cease and desist from any sexual harassment and constructive discharge in the future; and
- (4) order Respondent Ray Ishmeal to contact the Department and go through sensitivity training on civil rights laws;

HUMAN RIGHTS COMMISSION

BY: _____
REVA S. BAUCH
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: February 6, 2009